

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ABANTE ROOTER AND PLUMBING,
INC., individually and on behalf of all others
similarly situated,

Plaintiff,

v.

TOTAL MERCHANT SERVICES, LLC, a
Delaware limited liability company,

Defendant.

Case No. 3:19-cv-05711-EMC

**JOINT CASE MANAGEMENT
STATEMENT**

Plaintiff Abante Rooter and Plumbing, Inc. (“Plaintiff” or “Abante”) and Defendant Total Merchant Services, LLC (“Defendant” or “Total Merchant”) (collectively Plaintiff and Defendant are referred to as the “Parties”) jointly submit this Joint Case Management Statement pursuant to the Standing Order for All Judges of the Northern District of California, Rule 26(f) of the Federal Rules of Civil Procedure, and Civil Local Rule 16-9.

1. Jurisdiction & Service

No dispute exists regarding venue or personal jurisdiction over Defendant concerning Plaintiff’s individual claims. Defendant has asserted the affirmative defense of lack of personal jurisdiction concerning the alleged claims of non-California putative class members pursuant to *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). As can explained in briefing if necessary, Plaintiff denies that *Bristol-Myers* is applicable to this case. All parties have been served. Subject to the affirmative

1 defenses of Defendant, this Court appears to have subject matter jurisdiction over Plaintiff's
 2 claim under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA"),
 3 pursuant to 28 U.S.C. § 1331.

4
 5 **2. Facts**

6 Plaintiff's Position: The facts are straightforward. Abante received calls on cellular
 7 telephones from or on behalf of Total Merchant marketing Total Merchant's payment processing
 8 services. Abante denies ever providing prior express consent to receive such calls. —In February
 9 2017, Abante requested that the calls stop by providing, through counsel, details of the calls to
 10 Total Merchant's General Counsel, which included the phone numbers the calls were being made
 11 from as well as the phone numbers that received the calls. Despite this, and notwithstanding the
 12 General Counsel's representations that Abante's numbers were placed on a Do Not Call List,
 13 Abante began receiving additional calls in November 2018. Abante received at least three
 14 telemarketing calls regarding Total Merchant's products or services in November 2018, one call
 15 in March 2019, and one call in June 2019. Abante provided no prior express consent to receive
 16 any of these calls. Additionally, Abante alleges that all such calls were placed using an automatic
 17 telephone dialing system ("ATDS").

18 Defendant's Position: Defendant denies the material allegations set forth in Plaintiff's
 19 Complaint, including Plaintiff's entitlement to damages, and disputes the contentions raised
 20 therein. Among other denials and defenses, Defendant (1) denies making the alleged outbound
 21 calls to Plaintiff, if any; (2) denies that any of the alleged outbound calls to Plaintiff, if any, were
 22 made by a third-party on Defendant's behalf; (3) asserts Plaintiff, either expressly, implicitly, or
 23 by third parties, consented to telephonic communication with Defendant, if any; and (4) asserts
 24 telephonic communication between Plaintiff and Defendant, if any, was either initiated by
 25 Plaintiff, initiated by or on behalf of Defendant pursuant to Plaintiff's consent, and/or not
 26 initiated by or on behalf of Defendant through the use of an automatic telephone dialing system
 27 ("ATDS").

28 Additionally, Defendant disputes that any basis exists to convert the existing action

1 between Plaintiff and Defendant into a nationwide class action as, among other reasons,
2 Plaintiffs cannot establish the requirements of Federal Rule of Civil Procedure 23.

3
4 3. Legal Issues

5 Plaintiff's Position

6 1. Whether the equipment allegedly used by Total Merchant or its agents to make the
7 alleged calls constitutes an ATDS under the TCPA.

8 2. Whether Total Merchant obtained prior express consent to make the alleged calls.

9 3. Whether Total Merchant honors stop calling requests and has policies and procedures
10 designed to process do not call requests;

11 4. Whether the proposed class can be certified as a class action in accordance with
12 Federal Rules of Civil Procedure 23.

13 5. To the extent Total Merchant did not make the calls itself, whether Total Merchant can
14 be held liable for the actions of its agents.

15
16 Defendant's Position:

17 1. Whether Plaintiff has standing to assert the claims alleged in the Complaint,
18 including, but not limited to, whether Plaintiff suffered any concrete harm as a result of the
19 allegations set forth in the Complaint;

20 2. Whether Plaintiff consented and/or provided prior permission to receive the telephone
21 calls alleged in the Complaint;

22 3. Whether the telephone calls alleged in the Complaint were sent using an ATDS; and

23 4. Whether Defendant is directly and/or vicariously liable for the claims alleged in the
24 Complaint.

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26 4. Motions

27 Plaintiff's Position

1 Plaintiff anticipates moving for class certification following class discovery and
2 potentially moving for summary judgment in favor of itself and the class members. Discovery
3 motions may also be potentially necessary.

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5 Defendant's Position: After it has received sufficient discovery, Defendant anticipates
6 filing a motion for summary judgment regarding its lack of liability and reserves the right to file
7 other pretrial motions, including, but not limited to, discovery motions, motions in limine, and/or
8 *Daubert* motions.

9
10 5. Amendment of Pleadings

11 Plaintiff's Position:

12 Discovery may reveal other entities or individuals personally involved in the making of
13 the calls so as to warrant their inclusion as additional defendants. Plaintiff also anticipates the
14 potential need to amend the class definition following appropriate class discovery regarding the
15 contours of the class. Plaintiff's position is that a deadline for amending the pleadings should be
16 set at some point following completion of certain discovery regarding class related issues so as to
17 identify any additional culpable parties and to appropriately focus the class definition. A deadline
18 of 150 days following commencement of discovery regarding class related issues would suffice.

19 As to Defendant's position, Plaintiff asserts that it did conduct a reasonable pre-suit
20 investigation. Naturally, not all information regarding the facts and circumstances surrounding
21 the allegations in the complaint can be obtained pre-suit and without formal discovery.

22
23 Defendant's Position: Defendant proposes February 1, 2020 as a deadline for the
24 amendment of pleadings. The Federal Rules of Civil Procedure require Plaintiff to conduct a
25 reasonable investigation into the facts and circumstances surrounding the allegations and claims
26 asserted in the Complaint. Part of this reasonable investigation should have included research
27 regarding the telephone numbers that called Plaintiff's redacted telephone number(s)—
28 information presumably within Plaintiff's possession, custody, or control. An additional five (5)

1 months of discovery to accomplish this most basic investigation should not be condoned by the
2 Court.

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4 6. Evidence Preservation.

5 The Parties certify that they have reviewed the ESI Guidelines. During the Rule 26(f)
6 conference, counsel for the Parties discussed the potential ESI implicated in this case. The
7 Parties confirm that any relevant ESI is being appropriately preserved. Should discovery
8 proceed, the Parties are committed to working together to reduce the costs of ESI.

9
10 7. Disclosures

11 The Parties will exchange initial disclosures on or before December 26, 2019.

12
13 8. Discovery

14 No discovery has been served thus far and the parties have not identified any discovery
15 disputes. Plaintiff anticipates serving its first set of discovery requests prior to the Initial Case
16 Management Conference.

17 Pursuant to Fed. R. Civ. P. 26(f), the parties submit the following discovery plan:

18 (1) **Changes to disclosures.** The parties do not expect that any changes will be made in
19 form or requirement of the parties' Rule 26(a) disclosures.

20 (2) **Subjects on which discovery may be needed.** Discovery will be needed on the
21 allegations asserted in the Complaint and the legal issues set forth above.

22 (3) **Issues relating to disclosure or discovery of electronically stored information.** If
23 certain discovery is to be produced in electronic form, the parties have agreed to meet and
24 confer, as necessary, to resolve any issues concerning electronic discovery as they arise.

25 (4) **Issues relating to claims of privilege or of protection as trial-preparation**
26 **material.** The parties will meet and confer as necessary to discuss this if the issue arises.

27 (5) **Changes in limitations on discovery.** The parties do not foresee changes that should
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1 be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or
 2 the Civil Local Rules. If changes need to be made, the parties agree to meet and confer.

3 (6) **Orders that should be entered by the court.** The parties anticipate that a protective
 4 order governing the treatment of confidential information will be required and will submit a
 5 proposed order in the form of the Northern District's model order.

6
 7 9. Class Actions

8 The Parties propose conducting discovery and briefing class certification pursuant to the
 9 schedule set forth below at Section 17.

10
 11 10. Related Cases

12 The Parties are unaware of any pending cases related to this action. The Parties are
 13 aware of the closed but related case styled *Collins, et al. v. Total Merchant Services, Inc., et al.*;
 14 Case No. 3:17-cv-03806-CW (N.D. Cal.).

15
 16 11. Relief

17 Plaintiff seeks statutory damages for Total Merchant's alleged violations of the TCPA,
 18 which provides \$500 per call, which may be trebled to \$1,500 per text message where the calls
 19 were made wilfully without prior express consent. Damages will be calculated depending upon
 20 the number of class members and the number of calls following discovery. Defendant disputes
 21 liability and denies Plaintiff or the proposed nationwide classes are entitled to any relief
 22 whatsoever, and instead, Defendant seeks recovery of its attorneys' fees and costs from Plaintiff
 23 for the defense of this action to the greatest extent permitted by applicable law.

24 12. Settlement and ADR

25 The Parties have complied with ADR L.R. 3-5. A Stipulation and [Proposed] Order
 26 Selecting ADR Process has been filed with the Court. The Parties anticipate attending private,
 27 non-binding mediation before a mutually agreeable mediator. No settlement discussions have
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occurred to date, although the Parties are open to discussing settlement informally at any appropriate time.

13. Consent to Magistrate Judge For All Purposes

All Parties do not consent to have a magistrate judge conduct all further proceedings.

14. Other References

The parties agree that the case is not suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues

The Parties agree, to the extent necessary, to explore facts that can be proven by stipulation at the appropriate time.

16. Expedited Trial Procedure

The Parties do not believe that this case is suitable for an expedited trial.

17. Scheduling

The Parties propose the following case schedule. The Parties agree on all dates except for the deadline to join other parties and to amend the pleadings.

EVENT	DATE
Deadline to join other parties and to amend the pleadings	<u>Plaintiff:</u> May 11, 2020 <u>Defendant:</u> February 2, 2020
Deadline to exchange Fed. R. Civ. P. 26(a)(2) expert witness disclosures	<u>Plaintiff:</u> September 21, 2020 <u>Defendant:</u> November 23, 2020
Deadline for Plaintiff to file motion for class certification	December 31, 2020
Deadline to complete discovery, including all	January 22, 2021

expert discovery	
Deadline for Defendant to file response to motion for class certification	February 12, 2021
Deadline for Plaintiff to file reply in support of class certification	February 26, 2021
Deadline to file dispositive motions	April 16, 2021
Deadline to file <i>Daubert</i> motions	April 16, 2021
Deadline to file response to dispositive motions	May 17, 2021
Deadline to file reply in support of dispositive motions	May 31, 2021
Deadline to file all other pre-trial motions, including <i>Motions In Limine</i>	July 12, 2021
Pre-trial conference	August 16, 2021
Trial	September 2021

18. Trial

If this matter is certified as a class action, the Parties anticipate a jury trial of 3-5 days.

19. Disclosure of Non-party Interested Entities or Persons

The Parties have filed the required Certification of Interested Entities or Persons.

20. Professional Conduct

All counsel have reviewed the Guidelines.

21. Other

The parties are not aware of any other matters at this time.

Dated: December 20, 2019 /s/ Patrick H. Peluso
Counsel for Plaintiff

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Dated: December 20, 2019

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SIGNATURE CERTIFICATION

Pursuant to Civil L.R. 5-1(i)(3) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to counsel for Defendant and that I have obtained authorization to affix his or her electronic signature to this document.

By: s/ Patrick H. Peluso
Patrick H. Peluso

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above papers was served upon counsel of record by filing such papers via the Court's ECF system on December 20, 2019.

/s/ Patrick H. Peluso